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No. 92-222

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

STATE OF TENNESSEE,

Petitioner,

vs.

MELVIN CRUMP,

Respondent

Petition for Writ of Certiorari
to the Supreme Court of Tennessee

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Fifth Amendment and/or the Tennessee Constitution, Article I, Section 9, require suppression of a confession obtained by repeated coercive questioning initiated by police after a suspect in custody has invoked his right to remain silent.

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STATE OF TENNESSEE,

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Petition for Writ of Certiorari
to the Supreme Court of Tennessee

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Only the opinions of the courts below in the instant case have been provided in the Appendix and Supplemental Appendix filed by Petitioner.

The opinion of the Supreme Court of Tennessee in the companion case of State v. Smith, No. 03-S-01-9107-CR00054 slip op. (Tenn. May 18, 1992), decided the same day as the instant State v. Crump and whose content fully explains the grounds for the Crump decision below, is reprinted in the Appendix of Respondent attached (App.

Resp.).[1] Both the Smith and Crump opinions are designated for publication in _____ S.W.2d_____.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on May 18, 1992. The Petition for Certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court purportedly was invoked under 28 U.S.C. §1257(a). However, as Respondent's Brief will show, there is an adequate and independent basis for the decision below in the constitutional law of the State of Tennessee, which deprives this Court of jurisdiction and would render merely advisory any opinion this Court might render on the federal constitutional issue contained in the Petition.

ADDITIONAL CONSTITUTIONAL PROVISION INVOLVED

Tenn. Const. Art. 1, § 9

Right of the accused in criminal prosecutions. -- That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the

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[1] The State v. Smith companion opinion, which Petitioner did not include in either the Appendix or Supplemental Appendix, is being provided to the Court by Respondent in compliance with Supreme Court rules 14.1(k)(ii) and 15.1.

County in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

STATEMENT

Respondent is an inmate in the Tennessee Department of Correction. In September, 1988, he was arrested on suspicion of escape and of murder in Nashville, Davidson County, Tennessee, and later indicted on charges of escape, assault and first-degree murder. The present appeal arises from rulings on a pretrial motion to suppress. No trial has been held.

Although the terse Statement of the Case in the Petition (written without a single citation to the Record on Appeal or to any of the opinions of the courts below) misstates numerous issues of fact,[2] Respondent calls the Court's attention to only those misstatements of fact or law that might mislead the Court as to those issues that might properly be before it in the event a writ of certiorari should issue:

I. Basis of Constitutional Violations

The Petition asserts that Respondent argued below only that police failed to "scrupulously honor" his invocation to the "right to [remain] silen[t]," that his statements were involuntary, and that he "invoked his Sixth Amendment right to counsel" at the

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[2] E.g., Petitioner states that Respondent was taken by "Detective Moore and another officer" in a squad car to the scene of the escape, but all testimony and the findings of all courts below were that three officers accompanied Respondent. Compare Pet. 4 with App. 3-4.

beginning of the tape-recorded statement at police headquarters. Pet. 3. In fact, Respondent argued at all stages below, beginning at the pretrial suppression hearing, that the police actions violated his separate and specific State and federal constitutional rights not "to give evidence against" (State) and "not to be a witness against" (federal) himself; his separate and specific State and federal constitutional rights to counsel when questioned in custody;[3] his separate and specific State and federal constitutional rights not to have involuntary confessions used against him (state "law of the land" and federal "due process"); his Miranda rights; and his rights under Rule 5(a), Tenn. R. Crim. P., to be brought before a magistrate without undue delay.

Of those categories of argument, only one was ruled upon by the Supreme Court of Tennessee. That court specifically declined to rule on the involuntariness (due to physical coercion) and right to counsel claims (State or federal). App. 4-5 nn.1,2. The Rule 5(a) argument has not been reached by any court below.[4]

With respect to the self-incrimination rights (State and federal), Respondent at all stages below specifically relied upon

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[3] Respondent's argument that he was entitled to a cessation of questioning upon asking for counsel during custodial interrogation was, of course, as a federal matter, an invocation of the Fifth Amendment, not the Sixth Amendment (although this aspect of the Fifth Amendment serves both Fifth and Sixth Amendment purposes). Equally obviously, these rights are made applicable to the States through the Fourteenth Amendment due process clause.

[4] Petitioner has indicated below that it is prepared to go forward with this prosecution regardless of the appellate outcome on the suppression issue. Even on the suppression issue, three of the asserted grounds have not been dealt with as a final matter (and one of them not at all, even by the trial court).

Article I, Sections 8, 9, 13 and 16 of the Tennessee Constitution. Counsel devoted significant portions of written and oral argument to the State constitutional provisions (particularly Article I, § 9) as a proposed independent basis for decision. Following oral argument, counsel for Respondent supplied the Supreme Court of Tennessee an invited post-argument written submission on certain state issues. As discussed below, the Supreme Court of Tennessee responded to these arguments.

II. Concession of Michigan v. Mosley violation

The State conceded both at the pretrial hearing and on appeal that any statements made by Respondent prior to the second set of Miranda warnings should not be admitted at trial under the "scrupulously honored" principle of Michigan v. Mosley, 423 U.S. 96 (1975). Transcript of Proceedings, Vol. 3, at 108-110.

III. Opinions of the Tennessee Supreme Court in State v. Crump and State v. Smith

Obviously, this Court has the two companion opinions before it for its own review. It may be helpful to point out a few features of these opinions, however.

A. State v. Crump

The Tennessee Supreme Court found that Respondent replied to the Miranda warnings by saying either "I don't have anything to say right now," or "I don't have anything to say." App. 2,12. The court, as had both inferior courts below it, found that these words invoked the relevant State and federal self-incrimination rights. It then found that continued interrogation in the face of that invocation was a violation of constitutional dimension. App. 12. For those holdings, the court relied on O'Brien v. State, 221 Tenn. 346, 350, 426 S.W.2d 507, 508 (1968) and State v. Hartley, 103 N.J. 252, 273, 511 A.2d 80, 91 (1986). Hartley in turn relied on both New Jersey and federal constitutional law.

At the outset of its legal discussion, the Supreme Court of Tennessee held that "the test of voluntariness for confessions under Article I, §9 is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment. See State v. Smith, _____ S.W.2d _____ (Tenn. 1992)." App. 7.

Having thus found that the police violated Respondent's State and federal constitutional rights, the court turned to whether the "subsequent taped confession was involuntary and whether it must be excluded as the tainted 'fruit' of the constitutional violation."

App. 14. The court conducted its inquiry "[g]uided by the voluntariness factors set forth in State v. Smith, _____ S.W. 2d at _____," and found that "at the time of his confession, the defendant was still laboring under the psychological impact of having already confessed and 'let the cat out of the bag' during the drive." To determine whether the "cat out of the bag" problem had "vitiate[d] voluntariness," the court further examined the circumstances of the "stream of events" and held that the State had "failed to successfully rebut the presumption that the illegally-obtained, initial statements given on the drive also tainted the subsequent confession." For this analysis, the court again (twice) cited State v. Smith, using blank pinpoint citations to be filled in later. Pet. 15-16.

The court held further that the subsequent confession was tainted as "fruit of the poisonous tree" resulting from the initial constitutional violations, citing Brown v. Illinois, 422 U.S. 590, 603-04 (1975) and State v. Chandler, 547 S.W.2d 918, 920 (Tenn. 1977). App. 16. A two-justice dissent agreed that Respondent's "invocation of his right to remain silent was not scrupulously honored," but argued that the record did not establish "deliberately coercive or improper tactics," and therefore concluded that the "police failure" did not "rise to the level of a constitutional violation" of either the Fifth Amendment or Article I, § 9. App. 18.

B. State v. Smith

In this companion case, the Supreme Court of Tennessee unequivocally rejected, as part of the constitutional law explicating Tenn. Const. Article I, §9, the portion of the decision of this Court in Oregon v. Elstad, 470 U.S. 298 (1985) that dealt with the "cat out of the bag" theory:

> We believe that adherence to the spirit and principles of Article I, §9 of the Tennessee Constitution requires us to recognize, as a matter of Tennessee constitutional law, the inherent reasonableness of the underlying premise expressed in [United States v.] Bayer[,331 U.S. 532 (1947)] and Martin [v. State, 1 Tenn. Crim. App. 282, 291, 440 S.W.2d 624, 628 (1968)]. Consequently, we dispute the rationale of the Elstad decision that, absent coercion in eliciting an initial confession, psychological pressures and other pressures flowing from that confession can never lead a defendant to give subsequent, involuntary, incriminating statements.

State v. Smith, App. Resp. 10-12. The court then relied upon Justice Brennan's dissent in Elstad, 470 U.S. at 328, 335, and created a rebuttable presumption (simultaneously employed in Crump) that the prosecution must overcome in subsequent-confession cases, including those involving the mere absence of initial Miranda warnings, as in Elstad and Smith. App. Resp. 12. The Court was clear and unequivocal:

> Our ruling today that an illegally-obtained, initial confession is presumed, subject to rebuttal, to have tainted any subsequent confession, even if the later statement is preceded by proper Miranda warnings, expressly rejects the United States Supreme Court majority holding in Elstad v. Oregon.

App. Resp. 16.

Henceforth, in cases involving confessions given subsequent to an initial, illegally obtained confession, Tennessee courts must decide whether an accused has voluntarily confessed and made "a free and informed choice to waive the State constitutional right not to provide evidence against one's self." App. Resp. 12-13 (emphasis added). To address these issues, courts are to examine nine specific factors. Id. 13. The court below explained its reasoning at several points. See, e.g., id. 8, 11, 16-17.

In Smith, the court found that the subsequent confession was given knowingly and voluntarily. In Crump, as noted above, application of this same new standard on the same day produced the opposite result. The court noted that it was "guided by the voluntariness factors" set forth in Smith and cited Smith for its rebuttable-presumption approach (adopting the Brennan dissent in Elstad) to the "cat out of the bag" issue. App. 15-16.

ARGUMENT

I. There is an Adequate and Independent Basis for the Decision Below in State Constitutional Law.

Petitioner's arguments are utterly specious that the decision below should be presumed to rely on federal law under Michigan v. Long, 463 U.S. 1032, 1041 (1983). Pet. 11-12 n.1. It will be obvious from the discussion above that this lengthy jurisdictional footnote in the Petition is littered with misstatements. Petitioner, never citing specifically to the companion Smith decision, deploys a meaningless jurisdictional analysis of numerology oddly bereft of legal analysis, claiming that the majority opinion in Crump "cites a total of eleven federal cases and four state cases, presumably to demonstrate that the State courts have followed federal law in the past." Id. Equally without foundation are the Petition's statements that the court below "did not give any explanation of the basis for this greater protection" of State constitutional law, "gave no indication" that these State protections commanded the decision reached, and "felt compelled by the federal constitution" to suppress the confession.

It is clear from the decision below, particularly when read in light of the companion Smith opinion to which it cites extensively and specifically, that the adequacy and independence of the State law ground is "clear from the face of the opinion," and thus the presumption of Michigan v. Long is inapplicable. 463 U.S. at 1040-41. The "plain statement" doctrine of Long is applicable when a state court "chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions." Id. No such

practice was followed below. The court in Crump (and in Smith) made it clear that it was rejecting an aspect of federal law to craft independent state constitutional law. This clear expression that the decision was "alternatively based on bona fide separate, adequate, and independent grounds" precludes jurisdiction under Long. Id. at 1041. See Coleman v. Thompson, _____ U.S. _____, 111 S.Ct. 2546 115 L. Ed.2d 640, 657-58 (1991); California v. Freeman, 488 U.S. 1311, 1313-14 (1989) (O'Connor, Circuit Justice).

In the face of such clear fashioning of independent State constitutional law, any review of federal law issues by this Court ultimately would result only in the issuance of an advisory opinion. See Freeman, 488 U.S. at 1314.

II. In Any Event, the Federal Law Issues Below Were Decided Correctly As an Alternative Basis for the Result.

Even if this Court were to assume jurisdiction, the federal law portion of the decision below represents only a careful and correct application of the Oregon v. Elstad and Michigan v. Mosley case law. The Supreme Court of Tennessee specifically adverted to an exchange of footnotes in the Elstad opinion between the majority and the principal dissenter in distinguishing the circumstances in Elstad from those in the present case. App. 13 (citing Elstad, 470 U.S. at 312-13 n.3 (majority) and 346 n.28 (Brennan, J., dissenting)).

In noting this distinction, the court below was following other courts who similarly have perceived the difference between a

simple police failure to administer Miranda warnings and a "failure to honor, after they have been asserted, the constitutional rights those warnings are designed to secure." App. 13 (quoting State v. Hartley, 103 N.J. at 272, 511 A.2d at 90).

Contrary to Petitioner's assertions, the court below did not hold, and it was in no way the case, that the police conduct here was a mere "technical violation" of Michigan v. Mosley, 423 U.S. 96 (1975) and Miranda v. Arizona, 384 U.S. 436 (1966). App. 15-17.

In Mosley this Court labeled "absurd" any argument that police interrogators could be allowed to resume interrogation after only a "momentary respite" following a suspect's invocation of his right to remain silent:

> To permit the continuation of the custodial interrogation after a momentary cessation would clearly frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned.

423 U.S. at 102.

What the officers actually did in the present case was to deliberately subject Respondent to an immediate and prolonged period of incommunicado interrogation during which they hoped and expected he would give them the incriminating responses they sought. According to police testimony, Respondent was handcuffed throughout the psychologically coercive ride-around that, among other things, retraced the alleged route followed by the perpetrator of the crimes charged. App. 4. Further according to police testimony, the officer to whom Respondent invoked his rights informed his supervisor of that fact, but the supervisor (who later

could not recall being so informed) took Respondent out in the squad car with two other officers for the ride-around. App. 3; Pet. 3. The first officer, upon observing Respondent when the foursome returned, noted signs of "mental abuse." App. 5,15. The supervising officer described other visible psychological effects upon Respondent as a result of trickery and other psychological ploys used as interrogation techniques. App. 4,15. Another officer testified that the purpose of the tape-recorded statement was merely to "get more detailed information" in light of the statements made during the ride-around, and to get those statements on tape. Tape Recording of Preliminary Hearing, Exhibit 12 to Hearing on Motion to Suppress Statements. Finally, it must be remembered that, although what was said was not ruled upon by the court below, it is undisputed that at the precise point in the Miranda warnings that preceded the tape-recorded statement at which the availability of a lawyer is described, Respondent clearly said something which the police heard but flatly ignored with an admonition not to interrupt. App. 27, 42. Respondent has insisted that the tape reveals he said "I want one now." Petitioner's position has been that the tape reveals Respondent said "I don't want nairn." Thus, rather than being "inaudible," Pet. 4, the interruption to the tape-recorded warnings is "poorly audible,"[5] and absolutely establishes that Respondent interrupted the warnings

[5]In an effort to aid explication of the tape, Respondent below proffered to the intermediate appellate court and to the court immediately below sworn statements from a skilled linguist attesting that her expert analysis supports Respondent's version of what he said.

when told he could have a lawyer. Such an interruption (even if its content cannot be deciphered presently with confidence) at a minimum imposed a duty upon the police to seek clarification. The interruption further casts a cloud over any attempt to use that second set of Miranda warnings to establish either a knowing and voluntary waiver of his rights by Respondent, or a break in the exploitation of evidence sufficient to establish attenuation under Wong Sun v. United States, 371 U.S. 471 (1963).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1992

APPENDIX OF RESPONDENT

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

STATE OF TENNESSEE,	)	FOR PUBLICATION
	)	Filed: May 18, 1992
Plaintiff-Appellee,	)	
	)	COCKE COUNTY CIRCUIT
	)	
	)	HON. J. KENNETH PORTER, JUDGE
VS.	)	
	)	
	)	S/C No. 03-S-01-9107-CR 00054
HOSIE VAN SMITH,	)	
	)	
Defendant-Appellant.	)	

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O P I N I O N

AFFIRMED. ANDERSON, J.

The primary issue raised on this appeal is whether the defendant's confession, obtained after proper administration of Miranda warnings, is inadmissible at trial because a prior incriminating statement was obtained in violation of the Fifth Amendment of the United States Constitution and Article I, § 9 of the Tennessee Constitution. The initial incriminating statement made by the defendant, Hosie Smith, before any Miranda warning was given to him was suppressed. A later confession was obtained after a search had revealed cocaine in Smith's possession and after the police had read Smith his Miranda rights. The admissibility of the confession was challenged on the grounds it was involuntary and tainted as the fruit of the first unwarned incriminating statement given in violation of the Federal and State Constitutions. After the trial court overruled the defendant's motion to suppress his confession, Smith was convicted of possessing more than 30 grams of cocaine with the intent to deliver, sentenced to 30 years incarceration, and fined $10,000.00. The conviction was affirmed by the Court of Criminal Appeals, after that court determined that the confession was given knowingly and voluntarily, and was thus admissible at trial. We likewise conclude that the confession was knowing and voluntary on the grounds set out herein and, therefore, affirm.

FACTUAL HISTORY

On October 28, 1988, Officers Mike Hannan and Terry Thomas of the Tennessee Highway Patrol were traveling west on I-40 in Cocke County when they clocked a Ford Taurus station

wagon traveling east at 84 miles per hour in a 65 miles-per-hour zone. As a result, the officers turned around in the median and, at approximately 5:20 p.m., stopped the vehicle that was being driven by Kellie Alisha Jones and in which the defendant was riding.

After stopping the car, Officer Hannan approached the driver's side of the vehicle and asked Jones for her license and registration. Jones was able to produce her license, but was unable to find the vehicle's registration. When Officer Hannan asked Jones to whom the car belonged, she responded that her mother, Renee Preston, owned the car.

Because it was raining, Officer Hannan then asked Jones to exit her vehicle and accompany him to his squad car while he wrote out a traffic citation. Jones agreed and exited her vehicle, after asking Smith to keep looking in the glove compartment for the vehicle's registration.

While Smith was looking for the registration, Officer Thomas, who had approached the passenger's side of the car during Officer Hannan's conversation with Jones, asked Smith questions regarding ownership of the car and the couple's destination. Smith told Officer Thomas that the car belonged to a friend of his, and that he and Jones were headed to Fayetteville, North Carolina. When Officer Thomas asked if he was going to Fayetteville on vacation, Smith responded in the negative and stated that he was going there to stay.

After this brief conversation with Smith, Officer Thomas returned to the squad car and sat in the back seat. While waiting for radio verification of Jones's license and the vehicle's registration, both officers continued to question Jones. Although she stated that the car belonged to her mother, Renee Preston, Jones could not explain the difference in the last names after answering "no" to Officer Hannan's question of whether her mother had remarried. In response to questions about the couple's destination, Jones said they were headed to Fayetteville for a one-week vacation. When asked who her passenger was, Jones stated that it was her boyfriend, but she could only give the name "Pumpkin" in response to questions about his name.

Because Smith and Jones appeared to be extremely nervous and because of the inconsistencies in their responses to questioning, the officers became suspicious and asked Jones if she was carrying any illegal items, weapons, or contraband. When Jones denied knowledge of such cargo, both officers asked her if they could have permission to look in the vehicle and its contents. At the time she was asked this question, the officers told her that she could refuse, but Jones agreed to let the officers look through the car.

While Officer Hannan was completing the traffic citation, Officer Thomas re-approached the station wagon on the passenger side and conversed again with Smith. At this time, Officer Thomas asked Smith if there were any illegal items in the car. Smith denied knowledge of any such contraband. Thomas then advised Smith that Jones had given the

officers permission to look through the vehicle and that if anything illegal were found in the car, ownership of the illegal items would be attributed to both of them.

Although Smith denied having knowledge of anything illegal being in the car, Thomas asked him again. After hesitating, Smith said, "Yes, it was probably a hot load." Thomas then asked, "By a hot load, do you mean cash, marijuana, or cocaine, one of the three?" Smith responded, "Probably."

Following this conversation, Officer Thomas began searching the station wagon. He searched the front and back seat areas before attempting to open and search the back storage compartment area. When he was unable to open the back of the station wagon with the key from the ignition, Officer Thomas crawled over the back seat into the rear storage area and discovered a locked indentured compartment.

Because he was unable to open the indentured compartment with the ignition key and because it was raining heavily, Officer Thomas asked Jones if they could take the car to a service station to break open the compartment. Jones agreed and at approximately 6:00 p.m., Officer Thomas drove the station wagon to the service station after placing Smith in the back seat of the patrol car to ride with Officer Hannan and Jones. At the service station, with Smith still in the back seat of the patrol car, the officers broke open the compartment and found a cardboard box containing 10,000 grams (22 pounds) of 94 percent pure cocaine wrapped in 10

individual packets. Upon discovering the cocaine, at approximately 6:25 p.m., the officers placed both Smith and Jones under arrest, read them their Miranda rights, and transported them to Highway Patrol Headquarters.

At 9:45 p.m., Smith was questioned by Officer Lonnie Hood. Before he was questioned, Smith was read his Miranda rights again and signed a written waiver of those rights. During the course of the interrogation, Smith gave Officer Hood an incriminating account of his employment to drive the station wagon with Jones from Oklahoma City, Oklahoma, to Fayetteville, North Carolina. This statement was reduced to writing by Officer Hood and signed by Smith.

Following a suppression hearing, the trial court held that Smith's statements about the vehicle containing a "hot load" prior to his being Mirandized were inadmissible. The trial court held, however, that the cocaine was admissible at trial as the fruit of a valid consensual search, and that the later written confession signed by Smith was admissible because it had been given freely, knowingly, and voluntarily.

The case proceeded to trial before a jury and Smith was convicted of possessing cocaine in excess of 30 grams with the intent to deliver, in violation of Tenn. Code Ann. § 39-6-417 (1982 & Supp. 1988). The jury fined Smith $10,000.00, and the court sentenced him to serve 30 years in the Department of Corrections as a Range I offender.

The Court of Criminal Appeals affirmed the conviction and sentence.

DISCUSSION

I.

The dispositive issue in this case involves the admissibility of the confession given to Officer Hood and signed by Smith at the Highway Patrol Headquarters. The defendant contends that the confession was inadmissible because it was obtained in violation of his rights under the Fifth Amendment to the United States Constitution and Article I, § 9 of the Tennessee Constitution. Smith argues that his waiver of rights and his statement to Officer Hood were not voluntary, because they were tainted by Officer Thomas' conduct in first questioning Smith on the side of the interstate without administering Miranda warnings.

The Fifth Amendment to the United States Constitution, which is applicable to the States through the Fourteenth Amendment, Malloy v. Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L. Ed. 2d 653, 658 (1964), provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The corresponding provision of the Tennessee Constitution provides "[t]hat in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Tenn. Const. art. I., § 9. Although these provisions are not identical, this Court has previously declined to hold that protection under the state constitution is broader than that of the federal constitution

merely because the language of the two provisions is not the same. Delk v. State, 590 S.W.2d 435, 440 (Tenn. 1979). This observation, however, does not foreclose the possibility that the state constitutional provision might be applied more broadly than its federal counterpart, based upon considerations other than, and in addition to, the difference in terminology.

Prior to the decision in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the admissibility of an accused's in-custody statements depended on whether the statements were "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment. See, e.g., Haynes v. Washington, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963). In Miranda, however, the United States Supreme Court limited the admissibility of statements that would ordinarily meet the due process test of voluntariness in order to protect an accused's Fifth Amendment rights to be free from self-incrimination.

In order to combat the inherently compelling pressures of in-custody interrogation and to permit a full opportunity to exercise the privilege against self-incrimination, Miranda held that, prior to being subjected to custodial interrogation, "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." Miranda, supra, 384 U.S. at 467, 86 S. Ct. at 1624. The court also held that "the prosecution may not use statements, whether exculpatory, or inculpatory, stemming from custodial interrogation of the

defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Id., 384 U.S. at 444, 86 S. Ct. at 1612.

The court then instructed that, at a minimum, those procedural safeguards must include warnings prior to any custodial questioning that the accused has the right to remain silent, that any statement made may be used as evidence against the accused, and that the accused has the right to have an attorney, whether retained or appointed, present during questioning. Id. To further protect an accused's self-incrimination rights, the court also held that although these rights may be waived, the waiver must be made "voluntarily, knowingly, and intelligently." Id.

Following Miranda, a Supreme Court majority has held that the prophylactic Miranda warnings are not themselves rights protected by the Constitution, but are instead measures designed to ensure that the right against compulsory self-incrimination is protected and intelligently exercised. See, e.g., Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985); New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984); Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974). Nevertheless, even the Elstad majority agreed that "[f]ailure to administer Miranda warnings creates a presumption of compulsion." Elstad, supra, 470 U.S. at 307, 105 S.Ct. at 1292. Furthermore, that presumption is irrebuttable and "unwarned statements that are otherwise voluntary within the

meaning of the Fifth Amendment must nevertheless be excluded from evidence under Miranda." Id.

In Elstad, a majority of the United States Supreme Court decided that, in a situation similar to that faced by the defendant in this case, a trial court must conclude that an initial confession obtained without prior warnings regarding the right against self-incrimination is inadmissible. The court went on to hold, however, that the presumption of compulsion attaching to an unwarned confession does not also apply to a subsequent confession obtained after administering Miranda warnings. In discussing the admissibility of such a second confession at trial, the court stated:

> [A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.

Id., 470 U.S. at 314, 105 S. Ct. at 1296.

This holding by the United States Supreme Court represented a clear break with past precedent embracing the "cat out of the bag" theory espoused in United States v. Bayer, 331 U.S. 532, 67 S. Ct. 1394, 91 L. Ed. 1654 (1947). In Bayer, the court recognized:

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first.

Id., 331 U.S. at 540, 67 S. Ct. at 1398. See also Martin v. State, 1 Tenn. Crim. App. 282, 291, 440 S.W.2d 624, 628 (1968). Even in Bayer, however, the United States Supreme Court refused to hold that an illegally-obtained confession would forever foreclose the possibility that a subsequent admissible confession could be elicited from the defendant. In fact, in that case, the court determined that the subsequent confession given six months after the defendant's first statement would not be held invalid when the "only restraint under which [the defendant] labored was that he could not leave the . . . limits [of the military base on which he lived] without permission." Bayer, supra, 331 U.S. at 541, 67 S. Ct. at 1398.

We believe that adherence to the spirit and principles of Article I, § 9 of the Tennessee Constitution requires us to recognize, as a matter of Tennessee constitutional law, the inherent reasonableness of the underlying premise expressed in Bayer and Martin. Consequently, we dispute the rationale of the Elstad decision that, absent coercion in eliciting an initial confession, psychological pressures and other pressures flowing from that confession can never lead a defendant to give subsequent, involuntary, incriminating

statements. As noted in Justice Brennan's dissent in Elstad, even standard interrogation manuals used by law enforcement agencies recognize that "[i]f the first admission can be obtained, 'there is every reason to expect that the first admission will lead to others, and eventually to the full confession.'" Elstad, supra, 470 U.S. at 328, 105 S. Ct. at 1303 (Brennan, J., dissenting).

Like the court in Bayer, however, we also refuse to hold that an initial, illegally-obtained confession forever bars the prosecution from obtaining a subsequent, admissible confession from the defendant. Rather, we hold that the provisions of Article I, § 9 of the Tennessee Constitution necessitate that we recognize that extraction of an illegal, unwarned confession from a defendant raises a rebuttable presumption that a subsequent confession, even if preceded by proper Miranda warnings, is tainted by the initial illegality. That presumption may be overcome by the prosecution, however, if the State can establish "that the taint is so attenuated as to justify admission of the subsequent confession." Elstad, supra, 470 U.S. at 335, 105 S. Ct. at 1306-07 (Brennan, J., dissenting).

In each such case, the crucial inquiry for the courts becomes whether the events and circumstances surrounding and following the initial, illegal conduct of the law enforcement officers prevented the accused from subsequently (1) making a free and informed choice to waive the State constitutional right not to provide evidence against one's self, and (2) voluntarily confessing his involvement in the

crime. In addressing these questions, courts should examine the following factors:

1. The use of coercive tactics to obtain the initial, illegal confession and the causal connection between the illegal conduct and the challenged, subsequent confession;

2. The temporal proximity of the prior and subsequent confessions;

3. The reading and explanation of Miranda rights to the defendant before the subsequent confession;

4. The circumstances occurring after the arrest and continuing up until the making of the subsequent confession including, but not limited to, the length of the detention and the deprivation of food, rest, and bathroom facilities;

5. The coerciveness of the atmosphere in which any questioning took place including, but not limited to, the place where the questioning occurred, the identity of the interrogators, the form of the questions, and the repeated or prolonged nature of the questioning;

6. The presence of intervening factors including, but not limited to, consultations with counsel or family members, or the opportunity to consult with counsel, if desired;

7. The psychological effect of having already confessed, and whether the defendant was advised that the prior confession may not be admissible at trial;

8. Whether the defendant initiated the conversation that led to the subsequent confession; and

9. The defendant's sobriety, education, intelligence level, and experience with the law, as such factors relate to the defendant's ability to understand the administered Miranda rights.

In ruling upon the admissibility of a subsequent confession following the determination that an initial, unwarned confession may not be introduced in the State's case-in-chief, no single factor listed above is determinative. Rather, a court must examine the totality of the circumstances surrounding the two confessions to determine whether the subsequent confession by the defendant can truly be termed a knowing and voluntary statement.

The facts of this case demonstrate that Smith's subsequent confession was given knowingly and voluntarily. No coercive tactics were employed by the law enforcement officials to elicit either the first or the second incriminating statement given by the defendant. More than three hours elapsed between the time Smith was arrested and first given his Miranda warnings and the time when he gave his second confession to the authorities. There is no evidence in the record that Smith was in any way mistreated during that time period or that he was prevented from contacting friends, family or legal counsel. Additionally, Smith had been advised of his Miranda rights twice before his second statement was given (once at the time of his arrest and again immediately before the second statement), both the interrogators and the place of interrogation changed from the first illegally-obtained confession, and there is no indication that Smith did not fully understand the rights explained to him.

In fact, Smith acknowledged that he understood his rights and signed a written waiver of them. In response to

questioning, Smith proceeded to give Officer Hood a statement of his involvement in the crime. There is no evidence that the interrogation producing the statement was unduly prolonged so that it could be characterized as an effort to wear down Smith's resistance and overcome his free will.

The only coercive influence apparent in this record is the fact that Smith was in police custody at the time of his statement and at all relevant times after his arrest. Although police custody is inherently coercive and compelling, if we were to hold this single factor sufficient to vitiate the voluntariness of a subsequent confession, an accused could never give a voluntary confession after arrest. We are unwilling to condone such a result because of our belief that "[c]onfessions remain a proper element in law enforcement." Miranda, supra, 384 U.S. at 478, 86 S. Ct. at 1630.

In short, our examination of the totality of the circumstances surrounding Smith's initial statement, his arrest and detention, and his subsequent confession leads us to the inescapable conclusion that Smith knowingly and voluntarily waived his right against self-incrimination prior to giving the written confession introduced at trial in this matter. The prosecution successfully rebutted the presumption that the illegally-obtained, initial statement given on the side of Interstate 40 also tainted the subsequent confession given by Smith. As a result, that second statement was properly admitted at trial.

Our ruling today that an illegally-obtained, initial confession is presumed, subject to rebuttal, to have tainted any subsequent confession, even if the later statement is preceded by proper Miranda warnings, expressly rejects the United States Supreme Court majority holding in Elstad v. Oregon. We believe, however, that the provisions of Article I, § 9 of the Tennessee Constitution mandate that the State, after illegally obtaining an incriminating statement from a defendant, must establish that the subsequent confession was given freely and voluntarily and that the constitutional right to be free from self-incrimination was not waived due solely to the psychological pressures resulting from giving the previous statement. Only then can we be assured that criminal defendants are not being unconstitutionally compelled "to give evidence against [themselves]."

The Concurring Opinion expresses concern that our retention of the "cat out of the bag" rule that an illegally obtained initial confession is presumed, subject to rebuttal, to taint a later confession will enable defendants to have confessions suppressed by merely demonstrating that their arrest and detention was psychologically stressful. This concern is unfounded because the "cat out of the bag" theory was adopted in 1947 by the U. S. Supreme Court in United States v. Bayer, supra, and was followed until the Court's split decision in 1985 in Oregon v. Elstad, supra, and there is no evidence that confessions were suppressed during that nearly 40-year period by merely showing that arrest and detention was stressful. In addition, as previously pointed out, Bayer, the case that espoused the "cat out of the bag"

theory, expressly recognized that the first inadmissible confession does not perpetually disable a defendant from subsequently giving an admissible confession.

II.

The defendant also contends that the consensual search of the station wagon was not valid because the officers never asked him for permission to search the car. Persons having equal rights to use or occupy premises may, however, consent to a search of them and the consent will be binding upon the co-occupants. Frazier v. Cupp, 394 U.S. 731, 740, 89 S. Ct. 1420, 1425, 22 L. Ed. 2d 684 (1969); Lester v. State, 216 Tenn. 615, 620, 393 S.W.2d 288, 290 (1965). Because Kellie Jones had an equal right to use and occupy the vehicle, her voluntary consent to search is valid and binding upon Smith as well. There is no merit to this issue.

III.

Finally, the defendant submits that the sentence imposed upon him after conviction was excessive. We concur in the conclusion of the Court of Criminal Appeals that this issue is also without merit.

The defendant's conviction is affirmed in all respects. The costs of this appeal are adjudged against the defendant.

E. RILEY ANDERSON, Justice

Concur:

Reid, C.J., and Daughtrey, J.
Drowota and O'Brien, JJ. (Separate Concurring Opinion)

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

STATE OF TENNESSEE, Plaintiff-Appellee, V. HOSIE VAN SMITH, Defendant-Appellant.	FOR PUBLICATION COCKE CIRCUIT Hon. J. Kenneth Porter, Judge S/C No. 03S01-9107-CR-00054

CONCURRING OPINION

I would affirm but apply the rule announced by the United States Supreme Court in Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed.2d 222 (1985). Specifically, I agree with that Court that "there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of Miranda, was voluntary." Id. at 318, 105 S. Ct. at 1297-98.

In Elstad, the United States Supreme Court held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." Id. at 318, 105 S. Ct. at 1298. Under Elstad, the factfinder is directed to "examine the surrounding circumstances and the entire course of police conduct" and thereby reach a determination as to whether the defendant's post-Miranda statement was

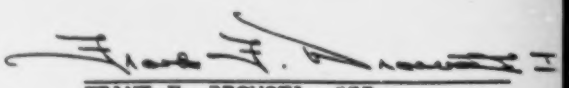
voluntarily made, see id.; because the trial court properly conducted this inquiry, I would affirm.

While the majority purports to adopt a presumption, apparently gleaned from Justice Brennan's dissent in Elstad, that an illegally obtained initial confession taints any subsequent confession, I submit that the majority does nothing more than examine the totality of the circumstances in order to determine whether Smith's post-Miranda statement was voluntarily made.

Further, the "psychological stress" component of the majority's presumption, see supra at __ ("the State . . . must establish that the subsequent confession was given freely and voluntarily and that the constitutional right to be free from self-incrimination was not waived due solely to the psychological pressures resulting from giving the previous statement"), gives reason for pause: Were the majority to actually apply Justice Brennan's "cat out of the bag" presumption, it is difficult to imagine that Smith's post-Miranda statement would be found free of taint. Smith waived his Miranda rights a mere three hours after his initial statement, and at a time when he was burdened by the "psychological stress" of knowing the police found 10,000 grams (22 pounds) of 94 percent pure cocaine in his car.

Finally, because Defendant's subsequent confession is clearly admissible, I decline the opportunity to circumscribe the boundaries of Article I, Section 9, of the Tennessee Constitution.

I am authorized to state that Justice O'Brien concurs in this concurring opinion.



FRANK F. DROWOTA, III
JUSTICE